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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 367

ELIZABETH HOSPITAL, INC.,
Petitioner,

vs.

FOUNT RICHARDSON; FRIEDMAN SISCO; RUTH ELLIS LESH; STANLEY APPLEGATE, Individually and As President of Washington County Medical Society; and WASHINGTON COUNTY MEDICAL SOCIETY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 10, 1959.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix B, *infra*) is not yet reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 10, 1959. By an order of that Court entered on July 29, 1959, the issuance of a mandate was stayed for a period of thirty (30) days from that date, pending application to this Court for a writ of certiorari (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

I.

Whether the complaint in this case stated a claim for relief under the provisions of the Sherman Anti-Trust Act, 15 U.S.C., Sections 1, 2, 12, and 15.

II.

Whether the complaint stated a claim for relief under the common law.

STATUTES INVOLVED.

The statutory provisions involved are the Sherman Anti-Trust Act, 15 U.S.C., Sections 1, 2, and 15 (Appendix A, *infra*), and 28 U.S.C., Section 1332 (a) (Appendix A, *infra*).

STATEMENT.

On May 28, 1958, the petitioner, Elizabeth Hospital, Inc., filed its complaint against the respondents in the United States District Court for the Western District of Arkansas, alleging that the petitioner was a Delaware corporation, that the respondents were citizens of Arkansas, and that jurisdiction of that court was based upon diversity of citizenship and the requisite jurisdictional amount as well as upon the provisions of the Sherman Anti-Trust Act, Title 15, U.S.C., Sections 1, 2, 12 and 15.

The complaint alleged that the petitioner was authorized by its charter to engage in the business of operating and maintaining a hospital or hospitals, and to accept, receive and admit patients for examination, diagnosis, and treatment, and to furnish facilities for medical and surgical treatment and care for the sick and injured, both as in-patients and as out-patients; that it had been authorized to do business in the State of Arkansas ever since the 10th day of January, 1938; and that ever since that date it had maintained a hospital at Prairie Grove, Arkansas; that said hospital was a modern, well-equipped plant with twenty-five (25) beds and eight (8) bassinets; that it had served more than seventeen thousand five hundred (17,500) patients from many states since it was authorized to do business in Arkansas; that it had been for more than fifteen (15) years approved for the summer training of final year medical students by the Faculty of Medicine of the University of Western Ontario, which is a Grade "A" medical school, so rated and graded by the American Medical Association; and that except for a period of the last five (5) years, since its approval it trained such students.

The complaint alleged that since May 19, 1952, it had held Serial and Certificate Number P-1098, issued by the United States State Department, designating it as an approved hospital for the training of medical students under the provisions of the United States Information and Educational Exchange Act of 1948, Title 22, U.S.C., Section 1431 *et seq.*; that petitioner was a member in good standing of the Arkansas Hospital Association, the Midwest Hospital Association, and the American Hospital Association; that it was a member hospital of the Blue Cross-Blue Shield plan for hospital and surgical care, which is a nation-wide plan; and that throughout the period of time during which it had maintained its said place of business at Prairie Grove, Arkansas, it had purchased, procured, obtained, and used large quantities and amounts of medical, surgical, and hospital instruments, equipment, supplies, drugs, medicines, furniture, fixtures, and other items of personal property, all of which were and had been produced, manufactured, developed, compounded, prepared, assembled and distributed by retailers, wholesalers, jobbers, distributors, and manufacturers located in various states outside the State of Arkansas, and in foreign countries, and all of which had been and were transported in interstate commerce to the petitioner from outside the State of Arkansas.

The complaint also alleged that throughout said period of time, Dr. Frank Riggall had been its chief of staff; that the said Dr. Frank Riggall was a duly and regularly licensed physician and surgeon engaged in the practice of medicine and surgery with his principal office at the place of business of petitioner. It alleged that Dr. Riggall received the degree of Bachelor of Arts, with Honors, from the University of Arkansas in 1931, and the degree of Master of Arts from that University in 1937. The educational

and professional qualifications of Dr. Riggall were detailed as follows: He was a graduate of the Faculty of Medicine of the University of Western Ontario, which is a Grade "A" medical school, so rated and graded by the American Medical Association, his degree of Doctor of Medicine having been conferred by that institution in 1934. He was Gold Medalist of his year for the highest marks in his final year at that medical school. He won the J. B. Campbell Memorial Scholarship in Medicine, the Ontario Medical Association Scholarship in Preventive Medicine; and was made an alumnus member of Alpha Omega Alpha, the international medical honor society. He proceeded to England on the aforesaid scholarships, and was graduated as Member of the Royal College of Surgeons of England, and Licentiate of the Royal College of Physicians of London in 1934. He passed the examination as a Specialist in Medicine of the Royal College of Physicians of Edinburgh, being made a Member of the College in 1935. He was elevated to the Fellowship of the Royal College of Physicians of Edinburgh in 1940, and passed the examinations for Specialist in Surgery of the Fellowship of the Royal College of Surgeons of Edinburgh in 1948. In 1949 he passed the specialist examinations in surgery and was made a Fellow Qua Surgeon of the Royal Faculty of Physicians and Surgeons of Glasgow. He is and was at all times mentioned in the complaint the holder of License Number R-818 issued on December 15, 1935, by the medical licensing board of the State of Arkansas, then commonly known as the "regular board", now the Arkansas State Medical Board.

The petitioner alleged that Dr. Frank Riggall had been at all times mentioned in the complaint engaged in the practice of medicine and surgery in Washington County, Arkansas; that at the place of business of petitioner and

elsewhere, he receives, accepts, treats, and administers to patients from the states of Arkansas, Oklahoma, Kansas, Missouri, Texas, and other states; that by virtue of his consultant's rank, his training in medicine and surgery, and the great amount of post-graduate training in medicine and surgery which he has assiduously had and received, the petitioner would in the past have received, accepted, treated and administered to and would in the future receive, accept, treat, and administer to a great many more patients than in the past have come or now come to or are referred to it, not only from within the State of Arkansas, but also from the States of Oklahoma, Missouri, Kansas, Texas, and other states, were the said Dr. Frank Riggall a member of the defendant Washington County Medical Society, and but for the unlawful conspiracy by the respondents mentioned and described.

The complaint stated that the combination, confederation, and conspiracy described in the complaint had resulted and would continue to result in a substantial interference with and burden and restraint upon the petitioner's accepting, receiving, treating, and administering to patients, as well as the referral of patients to it from outside the State of Arkansas by other physicians and surgeons; that the said Dr. Frank Riggall was the only physician and surgeon residing and practicing in Washington County, Arkansas, who was qualified as a specialist physician and specialist surgeon by virtue of having passed examinations with American Medical Association and international recognition, and that Dr. Riggall had pursued and received more post-graduate training in medicine and surgery than any of the individual respondents, and more than any known member of the respondent Washington County Medical Society.

The complaint alleged that the said Dr. Frank Riggall was and had been for many years a member in good standing of the following medical societies: The British Medical Association, The Canadian Medical Association, and a Fellow of the Royal Society of Medicine of London; that he was and had been at all times qualified for membership in the respondent Washington County Medicial Society; that he had four (4) times applied for membership in the Washington County Medical Society, each time upon forms prescribed by the constitution and by-laws of the said Washington County Medical Society; that his first application for membership in that society was submitted in 1935; that he again applied for membership in that Society on October 7, 1947, and again on December 7, 1954; that all of said applications were wrongfully, unlawfully, capriciously, and arbitrarily rejected and denied, and that neither the said Dr. Frank Riggall nor the appellant were informed or given any reason for the rejection and denial thereof; that after the rejection and denial of said application of December 7, 1954, Dr. Frank Riggall appealed therefrom to the Arkansas Medical Society in the form and manner and within the time provided by the constitution and by-laws of the Arkansas Medical Society, which latter society on the 24th day of July, 1955, affirmed the decision of the Washington County Medical Society; that no reason had ever been given Dr. Frank Riggall or the appellant for such affirmance.

The complaint recited that after the affirmance, Dr. Frank Riggall prosecuted an appeal from the decision of the respondent Washington County Medical Society and the Arkansas Medical Society to the American Medical Association, in the form and manner and within the time provided by the constitution and by-laws of the American Medical Association; that on or about March 23, 1956, the American Medical Association declined to take jurisdiction of said ap-

peal, whereupon the decision and determination of the Washington County Medical Society became and was final as far as organized medicine was concerned; that on or about September 27, 1956, Dr. Frank Riggall again applied to the respondent Washington County Medical Society for membership, upon forms provided and prescribed by it and by the Arkansas Medical Society, and in the manner prescribed by the constitution and by-laws of both of said societies; that such application was referred to a credentials committee of the Washington County Medical Society, and that committee reported that his credentials were in order and not subject to question; yet, notwithstanding such determination that his credentials were satisfactory, on November 6, 1956, the Washington County Medical Society rejected and denied said application by a vote of thirty-four to two; and that no reason had ever been given by the respondents for the rejection and denial of said application.

It was further alleged that at the time said appeal was lodged with the Arkansas Medical Society, the respondent Fount Richardson was a member of the Council of said Arkansas Medical Society, and said appeal was referred to and decided and determined by said Council; the said Fount Richardson was a past president of said Arkansas Medical Society; that in the event of further appeal by Dr. Frank Riggall to the said Arkansas Medical Society from the rejection of his application by the Washington County Medical Society, the said Fount Richardson and the other individual respondents would maliciously, wrongfully, unlawfully, capriciously, and arbitrarily use and exert their efforts to cause said Arkansas Medical Society to affirm said rejection and to deny Dr. Frank Riggall membership in the Washington County Medical Society, and would cause the said Arkansas Medical Society to affirm and rubber stamp the action of the Washington County Medical

Society; and that further appeal by Dr. Frank Riggall, either to the Arkansas Medical Society or the American Medical Association, or any other effort by him for relief within organized medicine, would be a useless formality, wholly futile and unavailing, and a waste of time and effort.

The complaint stated that the respondent Washington County Medical Society was an unincorporated professional economic instrumentality, organization and institution with at least thirty-six dues-paying or active members; that the respondents Fount Richardson, Stanley Applegate, Friedman Sisco, and Ruth Ellis Lesh, were all active members of said Society, and represented the common interests of all the members of said Society; that this suit was brought against said Society by and through the respondent Stanley Applegate, its president, and the other individual respondents all of whom were sued as individuals and in their representative capacities as president of said Society and as individuals having a common interest; and that the respondent Stanley Applegate was president of the respondent Washington County Medical Society at the time of the filing of and action upon the September 27, 1956, application of the said Dr. Frank Riggall hereinabove mentioned and had custody, control, possession, and charge of all its minutes, books, and other records.

The complaint set forth the following provisions of the constitution and by-laws of said County Society:

"ARTICLE III—ELIGIBILITY.

Every legally registered physician residing and practicing in Washington County who is of good moral and professional standing and who does not support or practice, or claim to practice, any exclusive system of medicine, shall be eligible for membership."

"CHAPTER II—POWER AND DUTIES.

Section 1—This Society shall have general direction of the affairs of the medical profession of the county, and its influence shall be constantly exerted to better the scientific, material and social condition of every physician within its jurisdiction. Systematic efforts shall be made by each member, and by the Society as a whole, to increase the membership until it embraces every reputable physician in the county."

The complaint stated that the respondent Washington County Medical Society held a charter from the organization and entity known as the Arkansas Medical Society, and was a component member of the said Arkansas Medical Society; and that the Arkansas Medical Society is made up of component societies consisting of those county medical societies which hold charters from it; and that the Arkansas Medical Society was a constituent member of the American Medical Association.

The very important part played by the American Medical Association in interstate commerce, and the value of American Medical Association membership to American doctors, were detailed in the complaint as follows: The American Medical Association is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal offices in the City of Chicago, Illinois. It is the only medical society or association of nation-wide prominence, importance, or influence in the United States, and has world-wide influence. Membership in it is of great economic benefit to a physician or surgeon and enables him to render far better service to his patients and to the public than he could possibly render without membership therein. According to the provisions of its constitution and by-laws, no physician or surgeon can become a member of the American Medical Association, or

participate in any of its activities, or receive any of its services and the economic benefits deriving and flowing therefrom, unless he is a member of the medical society within and for the county within which he resides and practices, and unless he also is a member of the state medical society of the state in which he resides and practices. Membership in the American Medical Association is of great economic as well as social benefit to a physician and surgeon, and membership in that organization would in the past have been and in the future would be of great economic and social benefit to Dr. Frank Riggall and all other members of the staff of petitioner. The American Medical Association maintains extensive offices. It prepares, edits, publishes, and distributes to physicians, surgeons, hospitals, and libraries all over the world various medical magazines, journals, and other publications of benefit and interest to physicians and surgeons. It periodically issues and publishes a directory of physicians and surgeons licensed in the United States of America and the Dominion of Canada, listing the members and non-members of the American Medical Association, in different type, so as to distinguish to the medical profession in general, as well as to the public, those physicians and surgeons who are its members from those who are not. Said medical directory plainly designates and denotes those physicians and surgeons who are qualified as specialists in their respective fields of medicine, but no doctor who is not a member of the American Medical Association, although qualified as a specialist, is listed in said directory as a specialist. Said American Medical Association annually and at other times during the year holds conventions as well as educational and instructive professional meetings which can be attended and participated in only by its members. Said meetings are held at different locations in the several states of the

United States, as well as at its principal offices in Chicago, Illinois. The listing of the staff members of the petitioner in said medical directory and the attendance and participation by them in the educational and instructional meetings held and fostered by the American Medical Association throughout the several states would have been in the past and would in the future be of great economic benefit to the petitioner, had they been or were they permitted to enjoy them.

The complaint alleged that solely because Dr. Frank Riggall had been denied membership in the respondent Washington County Medical Society and in the American Medical Association, he had been and was prevented from and could not do any of a number of enumerated activities, all of which would be of great economic benefit and importance to the petitioner and to its patients well as to the public and society in general, and all of which substantially affect trade and commerce and the flow of goods, wares, and merchandise between the State of Arkansas and other states, territories, and foreign countries.

The complaint asserted that membership in the Washington County Medical Society, the Arkansas Medical Society, and American Medical Association had come to be and was recognized as a certification of the repute and good standing of a physician and surgeon among his fellows; that it had become and was a prerequisite to various opportunities, privileges and prerequisites once freely open to all members of the medical profession; that the State, and the State alone, could legally issue or grant a license to practice medicine within the boundaries of the State of Arkansas, and all to whom its licenses were issued were presumed to be equal before the law, that yet the respondents had taken it upon themselves to exclude Dr. Riggall

from the opportunities, privileges, and prerequisites which the members of the aforesaid societies freely enjoy; and that, in effect, respondents had sought to substitute for the medical licenses from the State of Arkansas to Dr. Frank Riggall and all other members of the staff of petitioner an inferior and non-privileged license to practice medicine, and had damaged the business of the petitioner.

The petitioner alleged that the respondents being well acquainted with all the matters alleged in the complaint, and being fully aware of the far-reaching and mischievous consequences of such an unlawful course of conduct, combined, confederated, and conspired among themselves and with other persons to the petitioner unknown, in utter disregard of the published requirements for membership in the Washington County Medical Society, not to admit Dr. Frank Riggall to membership in said Society; and that petitioner was informed and believed and therefore alleged that such resolution or determination by the respondents, made effective by and through various secret caucuses and meetings attended by the appellees and reinforced by private talks among officers and members of said society, was a renewal of a conspiracy among the respondents which was of long standing.

The complaint alleged that the respondents had stated publicly, on many occasions and to many different people, that they were not required or obliged to give any reason whatever for refusing and denying Dr. Frank Riggall membership in the Washington County Medical Society, and that such statements had caused and done and would continue to cause and do untold harm, injury, and damage to the business of the petitioner, because they left and created the false impression and inference that Dr. Frank Riggall was not qualified for membership in said societies.

The complaint then detailed a list of twenty-four (24) separate, distinct, overt acts committed and done by the respondents, all of which rendered them liable to petitioner on account of a common law conspiracy, and all of which burdened, hindered, and restrained commerce within the provisions of the Sherman Anti-Trust Act. These overt acts were detailed as follows:

(a) Conspired to prevent the said Dr. Frank Riggall and all other members of the staff of plaintiff from obtaining staff privileges at the Washington County Hospital, located at Fayetteville, Washington County, Arkansas, which hospital was constructed in part by and with funds provided by the Hill-Burton Act, and which is operated and supported by and with public funds. Patients from many different states are received and treated at said hospital.

(b) Conspired to prevent the said Dr. Frank Riggall and all other members of the staff of plaintiff from obtaining staff privileges at Springdale Memorial Hospital, located at Springdale, Washington County, Arkansas, which hospital was constructed in part by and with funds provided by the Hill-Burton Act, and which is operated and supported by and with public funds. Patients from many different states are received and treated at said hospital.

(c) Conspired to prevent the said Dr. Frank Riggall and all other members of the staff of plaintiff from obtaining staff privileges at a hospital known as City Hospital, located at Fayetteville, Washington County, Arkansas, which hospital is supported and operated in part by and with public funds. Patients from many different states are received and treated at said hospital.

(d) Conspired to prevent the said Dr. Frank Riggall and all other members of the staff of plaintiff from receiving and obtaining staff privileges as part-time

consultants at the Veterans Administration Hospital located at Fayetteville, Washington County, Arkansas, which hospital is operated wholly by the Veterans Administration, and which receives, treats, and cares for patients from the several states.

(e) Prevented the plaintiff from accepting and receiving patients residing in Arkansas and states other than Arkansas, and referrals by physicians and surgeons who are members of the Washington County Medical Society as well as other medical societies in Arkansas and other states, including the states of Oklahoma, Missouri, Kansas, and Texas.

(f) Prevented the plaintiff from obtaining the benefits of consultations with other physicians and surgeons who are members of the defendant Washington County Medical Society and other medical societies located in Arkansas and other states, including the states of Oklahoma, Missouri, Kansas, and Texas.

(g) Prevented the plaintiff from obtaining physicians and surgeons who are citizens of the United States residing in Arkansas and other states to assist in the practice of medicine and surgery at the said Elizabeth Hospital.

(h) Prevented the plaintiff from obtaining duly qualified physicians and surgeons from foreign nations to assist in the practice of medicine and surgery at the said Elizabeth Hospital.

(i) Prevented the plaintiff from obtaining duly qualified and trained physicians and surgeons from other states to consult and assist in the practice of medicine and surgery at the said Elizabeth Hospital.

(j) Prevented the said Dr. Frank Riggall from obtaining a license to practice medicine and surgery in the State of Mississippi by reciprocity.

(k) Caused two Complaints to be filed before the said Arkansas State Medical Board, one on or about

the 26th day of April, 1956, and the other on or about the 18th day of June, 1956, seeking the revocation of the medical license of the said Dr. Frank Riggall, which Complaints were found groundless by said Arkansas State Medical Board on August 9, 1956, but the filing and prosecution of which by the said defendants subjected the plaintiff and the said Dr. Frank Riggall to embarrassment, ridicule, hatred, scorn, humiliation, and contempt in the eyes of the medical profession and of the public generally, both within and without the State of Arkansas, and caused the plaintiff great and irreparable harm, injury, damage, and financial loss.

(l) Caused two Complaints to be filed before the said Arkansas State Medical Board one on or about April 26, 1956, and the other on or about the 18th day of June, 1956, seeking the revocation of the license of Dr. Robert Douglas Manning, a physician and surgeon then and now employed by the plaintiff in the practice of medicine and surgery at the said Elizabeth Hospital, which Complaints were found groundless by the said Arkansas State Medical Board on August 9, 1956, but the filing and prosecution of which by the said defendants subjected Dr. Manning and the plaintiff to embarrassment, ridicule, hatred, scorn, humiliation, and contempt in the eyes of the medical profession and of the public generally, both within and without the State of Arkansas, and caused both Dr. Manning and the plaintiff great and irreparable harm, injury, damage, and financial loss.

(m) Caused two Complaints to be filed before the said Arkansas State Medical Board, one on or about the 26th day of April, 1956, and the other on or about the 18th day of June, 1956, seeking the revocation of the medical license of Dr. Donald Ross Dougall, a physician and surgeon then and now employed by the plaintiff in the practice of medicine and surgery at the said Elizabeth Hospital, which Complaints were found groundless by the said Arkansas State Medical Board on August 9, 1956, but the filing and prosecution of

which by the said defendants subjected Dr. Dougall and the plaintiff to embarrassment, ridicule, hatred, scorn, humiliation, and contempt in the eyes of the public generally both within and without the State of Arkansas, and caused both Dr. Dougall and the plaintiff great and irreparable harm, injury, damage, and financial loss.

(n) Prevented the plaintiff and its patients from obtaining and enjoying the benefits and services of trained nurses from the State of Arkansas and other states.

(o) Conspired to cause and did wrongfully and unlawfully cause the Arkansas State Medical Board to deny medical licenses to seven (7) duly trained and qualified Canadian physicians and surgeons, all of whom had been engaged by the plaintiff to join its staff, on the sole ground that said physicians and surgeons were not citizens of the United States, while at the same time the said Arkansas State Medical Board was granting and did grant medical licenses to other Canadian physicians and surgeons to practice medicine and surgery at other places in the State of Arkansas and to serve on the staff of the University of Arkansas School of Medicine.

(p) Prevented the said Dr. Frank Riggall and all other members of the staff of plaintiff from becoming members of and participating in and receiving the economic and other benefits of membership in the aforesaid American Boards, including such benefits as the great number of patients the plaintiff would have received from other states had the said doctors been certified by said Boards.

(q) Imposed a professional boycott upon the plaintiff, and thereby prevented the plaintiff from receiving great numbers of patients from outside the State of Arkansas and elsewhere.

(r) Prevented the said Dr. Frank Riggall and all other members of the staff of plaintiff from attending

and enjoying the economic benefits flowing from the aforesaid conventions and educational meetings sponsored and or conducted by the American Medical Association and the Arkansas Medical Society, and from receiving the services rendered by those organizations to their members, to the great injury and damage of the plaintiff.

(s) Combined, confederated, and conspired with and among themselves to influence and did actually influence all the members of the defendant Washington County Medical Society except two members thereof to vote against the said Dr. Frank Riggall and to deny him membership in the said Washington County Medical Society, as well and to deny him membership in the Arkansas Medical Society and the American Medical Association, and all the economic benefits flowing to him and the plaintiff from such membership.

(t) The defendant Fount Richardson, as editor of the publication known as *The Journal of the Arkansas Medical Society*, acting in his own behalf and as an agent, conspirator, and confederate of the other defendants named herein, edited, composed, published, and disseminated a libellous article in said publication in the July, 1955, issue thereof, at page 26, thereby stating that the said Dr. Robert Douglas Manning and the said Dr. Donald Ross Dougall were "doubtfully trained" in medicine and surgery, which libellous article subjected the said Dr. Robert Douglas Manning and the said Dr. Donald Ross Dougall, and the plaintiff as their employer to hatred, ridicule, contempt, and embarrassment in the State of Arkansas and in other states, and caused the said doctors and the plaintiff great and irreparable injury, damage, and economic loss. No recovery is sought against the defendants herein on account of the publication of said libellous article; said publication is mentioned herein only as an example and illustration of the extent to which the defendants have gone in the perpetration of said conspiracy.

(u) In the summer and fall of 1953, denied Dr. Evison R. Riggall, a duly qualified physician and surgeon and then a member of the defendant Washington County Medical Society and a member of the staff of the plaintiff, the right to staff privileges at the said Washington County Hospital except upon the conditions either that Dr. Evison R. Riggall abandon and remove his offices from the premises of said Elizabeth Hospital and completely disassociate himself from the said Dr. Frank Riggall (his father), or that the said Dr. Frank Riggall enter into a written undertaking thereby guaranteeing that neither he nor the plaintiff would accept consultations with or patients from certain specified, duly licensed and qualified M. D.'s residing and practicing medicine and surgery in Northwest Arkansas, and many of whose patients resided outside the State of Arkansas.

(v) Made and filed oral and written protests for the purpose of delaying, and did thereby cause the delay of, the approval of the hospital operated by the plaintiff for the rendering and furnishing of Federal Emergency Maternal and Infant Care to personnel of the armed forces of the United States and their dependents.

(w) Made and filed oral and written protests for the purpose of delaying and obstructing the approval by the American Medical Association of the hospital operated by the plaintiff.

(x) Prevented approval of the plaintiff, by the joint committee on accreditation, thereby tending to degrade the plaintiff in the eyes of hospital authorities, hospital supply houses, the public, and the medical profession.

The petitioner prayed for judgment against the respondents in the sum of $100,000.00 and for treble damages as provided in the Sherman Anti-Trust Act; for an injunction to prevent the respondents from further conspiring against

it in the manner described in the complaint, and for a mandatory injunction commanding the respondents to admit Dr. Riggall and all of the other staff members of the petitioner to full membership in the Washington County Medical Society.

The respondents filed motions to dismiss, which were sustained by the trial court by an Order entered on November 6, 1958. The case was duly appealed to the United States Court of Appeals for the Eighth Circuit, which entered judgment on July 10, 1959, affirming the judgment of the District Court. An order was entered in the United States Court of Appeals on July 29, 1959, staying the issuance of a mandate for a period of thirty (30) days.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Conflict with the Rules Expressed by This Court in the Following Cases: Klor's Inc., v. Broadway-Hale Stores, Inc., U.S. , 79 S. Ct. 705; Radovich v. National Football League, 352 U.S. 445; United States v. National Association of Real Estate Boards, 339 U.S. 485; and Times-Picayune Publishing Company v. United States, 345 U.S. 694.

In the decision below the United States Court of Appeals held, in effect, that the complaint was lacking in allegations that the petitioner was engaged in such a business or activity as would come within the protection of the Sherman Anti-Trust Act, and that interference with intrastate activity cannot constitute a violation of the Sherman Act unless its effect on interstate commerce is both substantial and direct. In reaching these conclusions the United States Court of Appeals fell into error by following

its former holding in the case of *Riggall* v. *Washington County Medical Society et al.*, 8 Cir., 1957, 249 F.2d 266 (certiorari denied 355 U.S. 954), where it had erroneously held that there can be no recovery on account of a violation of the Sherman Act unless there is injury to the public generally.

That the foregoing pronouncements are erroneous and in direct conflict with the decisions of this Court is easily demonstrated. In the recent case of *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, U.S. , 79 S. Ct. 705 (decided April 6, 1959), this Court granted certiorari to consider this very important question. There the district court had held that the complaint involved a "purely private quarrel" between Klor's and Broadway-Hale, which did not amount to a "public wrong prescribed by the Sherman Act." The Court of Appeals for the Ninth Circuit affirmed the judgment, holding that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured," and that "there was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality." This Court reversed the judgment of the Court of Appeals, and in so doing stated,

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality * * *.'
>
> "Plainly the allegations of this complaint disclose such a boycott. * * * It clearly has, by its 'nature'

> and 'character' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly", whether "the tendency is a creeping one" or "one that proceeds at full gallop." ' "

The decision below is in direct conflict with the principles expressed in the case of *Radovich* v. *National Football League*, *supra*, where this Court made it clear that the courts should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in the Sherman Act. There this court made it clear that Congress has,

> "by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by the aggrieved party. These laws protect the victims of the forbidden practices as well as the public."

This Court has held that "the fact that no goods are manufactured or bought or sold in the process" is wholly irrelevant as respects the question of whether an activity comes within the purview of the Sherman Act (*United States* v. *National Association of Real Estate Board*, *supra*). It also has said that "The 'market', as most concepts of the law of economics, cannot be measured by metes and bounds," and that an activity need not be so measured to determine whether it affects, or is affected by, that Act (*Times-Picayune Publishing Company* v. *United States*, 345 U.S. 694, *supra*).

The complaint of the petitioner in the instant case set out and detailed at least twenty-four (24) different, distinct, wrongful, unlawful, overt acts committed by the respondents, each of which constituted an effective boycott and resulted in a substantial interference with, restraint of, and burden upon commerce. These acts, as well as the nature and extent of the commercial activity carried on by the petitioner, are all set out in the statement of the case, *supra*. In the face of these clear rules of law and the allegations of the complaint, it is difficult for the petitioner to comprehend how the Court of Appeals could have concluded, as it did, that the complaint was "wholly lacking in a jurisdictional essential in that it fails to show that the conspiracy complained of had any restraining effect on interstate commerce within the meaning of the Sherman Anti-Trust Act." Such holding is patently in conflict with the decisions of this court.

II.

The Decision Below Is in Conflict with the Rules Expressed by This Court with Respect to Jurisdiction of the District Courts of the United States Based upon Diversity of Citizenship and Jurisdictional Amount.

The decision below also held that the complaint did not state a claim for relief under the common law. The petitioner is a Delaware corporation, the individual respondents are citizens of the State of Arkansas, and the amount in controversy exceeded the sum of $10,000.00, exclusive of interest and costs. Therefore, under the provisions of Title 28, U.S.C., Sec. 1332 (2), the United States District Court for the Western District of Arkansas had jurisdiction of the suit, irrespective of the application of the Sherman Act. The complaint clearly stated a claim for relief on account of a common law conspiracy, under

the rules expressed in the Arkansas case of *Southwestern Publishing Company* v. *Ney*, 227 Ark. 852, 302 S.W.2d 538, and cases therein cited, where the Supreme Court of Arkansas said,

> "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means."

The district court, of necessity, must apply the substantive law of the state in which the court sits, consequently here the complaint unquestionably stated a claim for relief on account of the common law conspiracy under Arkansas law (*Erie R. Company* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487).

CONCLUSION.

In conclusion, the petitioner respectfully submits that, because the complaint stated a claim for relief under the Sherman Act as well as under the common law, the decision of the court below was in direct conflict with the decisions of this court, and the writ of certiorari should issue.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX

APPENDIX A

Sections 1, 2, and 15 of the Sherman Anti-Trust Act, insofar as pertinent here, read as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *." (15 U.S.C.)

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." (15 U.S.C. 2).

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. 15).

Title 28, U.S.C., Section 1332(a), insofar as pertinent here, reads as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between— (1) citizens of different states; * * *."

APPENDIX B.

Opinion Below.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,187.

Elizabeth Hospital, Inc.
Appellant,

vs.

Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; Stanley Applegate, Individually and As President of Washington County Medical Society; and Washington County Medical Society,
Appellees.

} Appeal from the United States District Court for the Western District of Arkansas.

[July 10, 1959.]

James R. Hale for Appellant.

Eugene R. Warren (Warren and Bullion were on the brief) for Appellees.

Before SANBORN, VOGEL and VAN OOSTERHOUT, Circuit Judges.

VOGEL, Circuit Judge.

Elizabeth Hospital, Inc., plaintiff, (appellant here) is a Delaware corporation authorized to do business in Arkansas, where it maintains and operates a hospital at Prairie Grove, Washington County. Its stockholders are Frank Riggall, Eva E. Riggall, Cecil Riggall and Robert Douglas Manning, each of whom owns 25% of the capital stock. The defendants are Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; Stanley Applegate, individually and as president of Washington County Medical Society; Washington County Medical Society; and American Medical Association. The individual defendants are all physicians and surgeons and all defendants excepting the American Medical Association are citizens and residents of the State of Arkansas. The Washington County Medical Society is an unincorporated organization with at least 36 dues-paying or active members. The defendant Stanley Applegate is a member and president of such society and the other individual defendants are members thereof. A motion for dismissal as to the American Medical Association, a corporation organized under the laws of the State of Illinois, was granted by this court and it is accordingly not involved herein. For convenience, the parties will be designated as they were in the court below.

Plaintiff brought this action to recover treble damages in the total amount of $300,000.00 for alleged violations of the Sherman Anti-Trust Act, 15 U.S.C.A., § § 1, 2, 12 and 15, and to obtain an injunction requiring the Society and Association to admit Dr. Frank Riggall to membership therein. Plaintiff also alleged a violation of the constitution, statutes and common law of Arkansas, attempting thereby to create two grounds for federal court jurisdiction: First, under the Sherman Act; and, second, because of diversity of citizenship and amount involved.

In brief summary, plaintiff's complaint alleged that it was authorized to and did engage in the operation and maintenance of a hospital of which Dr. Frank Riggall was Chief of Staff; that it purchased medical equipment and supplies, etc., for its use in operating its hospital from outside the State of Arkansas. It alleged a conspiracy on the part of the defendants which interfered with the referral of patients to the plaintiff hospital from outside the State of Arkansas. The conspiracy was based upon the refusal of the Washington County Medical Society to admit Dr. Frank Riggall to membership therein, resulting in denial to him of membership in the Arkansas Medical Society and the American Medical Association.

Excepting for the fact that Elizabeth Hospital, Inc., is the named plaintiff in the instant case and here alleged violations of the law of Arkansas as well as violations of the Sherman Anti-Trust Act, the complaint is virtually the same as that contained in a recent case wherein the plaintiff was Dr. Frank Riggall and wherein the defendants included all those named as defendants herein and in which this court, in *Riggall* v. *Washington County Medical Society, et al.*, 8 Cir., 1957, 249 F.2d 266, certiorari denied 355 U.S. 954, sustained the District Court's dismissal of the complaint. The same District Court granted motions to dismiss here—*Elizabeth Hospital, Inc.* v. *Richardson, et al.*, D.C. W.D. Ark., 1958, 167 F.Supp. 155.

To sustain jurisdiction in the federal court it must be found that the allegations of the complaint, which for present purposes we must assume to be true, establish a claim under the law of Arkansas or that the complaint states a claim under the Sherman Anti-Trust Act. It has already been noted that the allegations of the instant complaint are, for all practical purposes, the same as the allegations contained in the complaint filed by Dr. Riggall in what

might be termed the earlier case, 249 F.2d 266. Therein, Dr. Riggall was the sole plaintiff. He sought to recover treble damages in the same amount as is sought by Elizabeth Hospital, Inc., in the present case. There, Dr. Riggall sought recovery because of alleged wrongful refusal of the Washington County Medical Society to admit him to membership. The alleged damage to the plaintiff here is likewise based on the Society's refusal of membership to plaintiff's Chief of Staff—the same Dr. Frank Riggall. In addition to the allegation of a conspiracy or combination in violation of the Sherman Anti-Trust Act, it was alleged that there was a conspiracy under the law of Arkansas to injure or damage the plaintiff by refusing Dr. Riggall and certain members of his staff membership in the Washington County Medical Society. Dr. Riggall's application for membership in the Society was rejected by the membership by a secret vote of 34 to 2. The by-laws of the Society are set forth in plaintiff's complaint. Among other things, they provide that the Society shall be the judge of the qualifications of its members. They also provide that the members shall vote upon all applications and that the elections shall be by secret ballot and that three-fourths of the votes of the membership present and voting shall be necessary to elect. The opinion of the District Court ably demonstrates that under neither the common nor statutory law of Arkansas was there a right of action spelled out in plaintiff's complaint, 167 F.Supp. 155. Citing Arkansas statutes dealing with monopolies, combinations and attempts to regulate or fix prices, it concluded, at page 162:

> "Since no monopoly or attempt at monopoly is alleged or shown by the facts in the complaint, and since it is likewise apparent that the plaintiff is not being driven from competition, these statutes have no application."

And at page 163:

> "The action of the medical society and its individual members, whatever their motive may have been, was not action to attain an unlawful purpose or to use unlawful means in attaining a lawful purpose, absent some specific statutory requirement that all persons be admitted to membership.
>
> It is true that the plaintiff alleges that the refusal of the defendants to admit Dr. Riggall to membership has resulted in a number of other conditions unfavorable to the plaintiff hospital as well as to Dr. Riggall. It may be seriously doubted whether any of the numerous conditions alleged to have been caused by the denial of membership are proximate results of that action by the medical society. Compare *Robinson* v. *Lull*, D.C. Ill. 1956, 145 F.Supp. 134, at page 137, where the court considered a series of facts similar to those presented here, and found no proximate connection between the acts of the defendants and the alleged injury.
>
> Assuming, however, that the conditions and injuries allegedly resulting from the medical society's denial of membership to Dr. Riggall were all proximate results of that action of the medical society, there is nevertheless no showing of any violation of state law in that action or any conspiracy to violate any state law. Most of the injuries said to result to the plaintiff and to Dr. Riggall from his inability to obtain membership in the medical society relate to the alleged loss of patients of the hospital. These assertions are in essence specifications of the allegation that the defendants, 'imposed a professional boycott upon the plaintiff, and thereby prevented the plaintiff from receiving great numbers of patients from outside the State of Arkansas and elsewhere.' These allegations, however, fall short of establishing a claim under Arkansas law."

Plaintiff here has utterly failed to demonstrate anything to the contrary and on this point cites but one case, *Southwestern Publishing Co.* v. *Ney*, 1957, 227 Ark. 852, 302 S.W.2d 538. Such case is no support for plaintiff's contention. It is this court's well established rule to accept the considered judgment of the trial judge on any matter of doubtful or disputed local law. *Guyer* v. *Elger*, 8 Cir., 1954, 216 F.2d 537, 540, certiorari denied 348 U.S. 929; *Bernard* v. *Wabash R. Co.*, 8 Cir., 1953, 208 F.2d 489, 493; *Buder* v. *Becker*, 8 Cir., 1950, 185 F.2d 311, 315-316; *Northern Liquid Gas Co.* v. *Hildreth*, 8 Cir., 1950, 180 F.2d 330, 336. We concur in the trial judge's opinion that the complaint spelled out no right of action under the law of Arkansas.

Next for consideration is whether a claim under the Sherman Anti-Trust Act has been alleged. Essential to jurisdiction is that the conspiracy complained of be "in restraint of trade or commerce among the several states • • •." To establish this fact, plaintiff alleged that the wrongful exclusion of its Chief of Staff from the Washington County Medical Society so diminished his professional standing as to reduce the number of patients, both from within and without Arkansas, seeking treatment at plaintiff's hospital. Plaintiff also alleged that it purchases from outside the State of Arkansas medical equipment and supplies, etc., for its use in operating its hospital. However, this fact need not be considered here as plaintiff has failed to assert that the conspiracy complained of interfered with these purchases.

We think that the plaintiff's operation of a hospital, to include rendition of hospital services to some persons who came from outside the state, is no more engaging in interstate commerce than was Dr. Riggall in rendering medical services to persons who likewise came from other states.

The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary. *A.L.A. Schechter Poultry Corp.* v. *United States*, 1935, 295 U.S. 495; *Lawson* v. *Woodmere*, 4 Cir., 1954, 217 F.2d 148, 150; *Jewel Tea Co.* v. *Williams*, 10 Cir., 1941, 118 F.2d 202, 207; *Lipson* v *Socony-Vacuum Corp.*, 1 Cir., 1937, 87 F.2d 265, 267, certiorari granted, 300 U.S. 651, certiorari dismissed, 310 U.S. 701.

Interference with intrastate activity cannot constitute a violation of the Sherman Act unless its effect on interstate commerce is both substantial and direct. *A.L.A. Schechter Poultry Corp.* v. *United States*, supra; *Mandeville Farms* v. *Sugar Co.*, 1947, 334 U.S. 219; *Local 167* v. *United States*, 1933, 291 U.S. 293. We observed in the earlier case at page 268:

> "There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. *The mere fact that plaintiff at his location in Arkansas may be treating patients from other states who must travel interstate does not result in practicing his profession in interstate commerce, as the transportation of such patients is incidental.* The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act. Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants." (Emphasis supplied).

The case of *Spears Free Clinic and Hospital for Poor Children* v. *Cohere, et al.*, 10 Cir., 1952, 197 F.2d 125, is on almost all fours with the instant case. Therein the court stated, at page 126:

> "The practice of the healing arts in Colorado, including chiropractic, is wholly local in character. The alleged conspiracy and the acts alleged to have been done in furtherance thereof had for their purpose and object the monopolization and restraint of purely local activities. No price fixing or price maintenance for professional or other services was involved. There was no intent to injure, obstruct or restrain interstate or foreign commerce. *The mere fact that a fortuitous and incidental effect of such conspiracy and acts may be to reduce the number of persons who will come from other states and countries to the Spears Hospital for chiropractic treatments does not create such a relation between interstate and foreign commerce and such local activities as to make them a part of such commerce.*
>
> *To come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote.*" (Emphasis supplied).

We think the complaint here is wholly lacking in a jurisdictional essential in that it fails to show that the conspiracy complained of had any restraining effect on interstate commerce within the meaning of the Sherman Anti-Trust Act.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Order Staying Issuance of Mandate.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16187——September Term, 1958.

Elizabeth Hospital, Inc., Appellant, vs. Fount Richardson, et al.	Appeal from the United States District Court for the Western District of Arkansas.

On consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 29, 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP. 29 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 367

ELIZABETH HOSPITAL, INC. *Petitioner*

v.

FOUNT RICHARDSON; FRIEDMAN SISCO; RUTH ELLIS LESH; STANLEY APPLEGATE, *Individually and as President of Washington County Medical Society; and* WASHINGTON COUNTY MEDICAL SOCIETY *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARAGON PRINTING CO., LITTLE ROCK

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SUPREME COURT OF THE UNITED STATES

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No. 367

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the 8th Circuit is not yet officially reported, but is found in the appendix to the petition.

JURISDICTION

The Petitioner seeks to review the action of the United States Court of Appeals for the 8th Circuit, in affirming a decree of the United States District Court for the Western District of Arkansas, dismissing Petitioner's Complaint.

QUESTIONS PRESENTED

I

Whether the Complaint in This Case Stated a Claim for Relief Under the Provisions of the Sherman Anti-Trust Act

II

Whether the Complaint Stated a Claim for Relief Under the Arkansas law

---

STATEMENT

Dr. Frank Riggall is a practicing physician residing in the Town of Prairie Grove, Arkansas, a town of approximately 1,000 inhabitants located in Washington County, Arkansas. He has resided and practiced medicine in Prairie Grove since 1923; under a regular medical license since 1935.

In 1956 Dr. Riggall applied to the Washington County Medical Society for membership in that Society. This application was the fourth made by Riggall to the Society, he having applied in 1935 and in 1947 and in 1954, and having been rejected by the Society on each of these occasions. His application of 1956 was received and submitted to the membership of the Society in accordance with its constitution and by-laws, which provide that the Society shall be the judge of the qualifications of its members. A secret ballot was taken, and Dr. Riggall's appli-

cation for membership was rejected by a vote of 34 against and 2 for admission.

In an effort to compel his acceptance into membership in the county society, Riggall then instituted an action in the United States District Court against the Washington County Medical Society and five of its members (four of whom are defendants in the present action), alleging a violation on their part of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. 1215. The complaint was essentially based upon allegations of loss of economic benefit and prestige to Dr. Riggall because he had not been accepted by the membership of the county society. As a basis for Federal Court jurisdiction Dr. Riggall alleged that he treated and administered to patients from other states; that the Washington County Medical Society was the only door to the Arkansas Medical Society, and from there to the American Medical Society, and that if granted membership in one society, he would then be accepted for membership in the other societies; that because of his superior ability and international recognition he would achieve widespread notoriety and as a result a great many persons from other sections of the United States would come to him for medical treatment and services. Dr. Riggall further alleged that because of his superior talents in the various branches or fields of medicine, he would have been and would be consulted by physicians from other states who would refer their patients to him for treatment and medical services. Said jurisdiction was essentially grounded upon Dr. Riggall's assertion that he treated patients from other states, and that if given recognition as a member of the society, he would receive more patients from other states and, therefore, the action of the Society and its members in preventing this flow of interstate business to him consti-

tuted a burden upon interstate commerce and was a violation of the Sherman Anti-Trust Act.

The defendants filed an answer denying that the Court had jurisdiction of the cause of action or that the Sherman Anti-Trust Act was applicable to the allegations of Dr. Riggall's complaint. The District Court determined that it was without jurisdiction and entered a judgment dismissing the complaint.

Dr. Riggall then appealed to the Court of Appeals where his appeal was dismissed and the judgment of the District Court affirmed. *Riggall v. Washington County Medical Society, et al.*, 249 Fed. 2d 266.

Dr. Riggall then sought certiorari in this court, which was denied 2 L. Ed. (2d) 530, 355 U. S. 954, 78 S. Ct. 540.

After the unsuccessful termination of Dr. Riggall's litigation, this action was filed by the appellant, Elizabeth Hospital, Inc., against the Washington County Medical Society, and four of the five former defendants. The allegations were essentially identical with the allegations in the Riggall case with the exception that the plaintiff is a hospital owned by Frank, Eva and Cecil Rigall, and Robert E. Manning; the hospital was incorporated under the laws of Delaware and authorized to do business in Arkansas; and the hospital purchased materials and supplies from states other than the State of Arkansas.

The complaint in the case at bar is practically identical with the complaint in the Riggall case, the same allegations of injury to Dr. Frank Riggall being made in both complaints. The appellant sought damages of $300,000.00 under the Sherman Anti-Trust Act. It also sought injunctive relief to compel the admission of Dr. Frank Riggall and all other members of the staff of plaintiff (unnamed) into membership in the Washington County Medical

Society. The American Medical Association was made a party defendant. The complaint alleged further that the defendants, in violation of the Constitution and the Statutes of the State of Arkansas and of the common law, and of the Sherman Anti-Trust Act, had conspired to prevent Dr. Frank Riggall and other members of the staff of the plaintiff (unnamed) from obtaining membership in the Washington County Medical Society, and had conspired to prevent Dr. Riggall and others (unnamed) from obtaining various economic benefits, all of which resulted in economic injury to the plaintiff.

The defendants (with the exception of the American Medical Association) filed a motion to dismiss the complaint of the plaintiff. The motion to dismiss alleged:

1. That the District Court had no jurisdiction of cause of action because the Sherman Anti-Trust Act had no application to the allegations allegedly forming the basis of this controversy;

2. That the action was primarily and essentially identical with the action in the former case of *Riggall v. Washington County Medical Society* in which it was decided that Federal Court jurisdiction did not lie;

3. That the Courts have no jurisdiction over the admission or rejection to membership in local professional associations or clubs or over their internal affairs.

4. That the action of the membership of a local medical society in rejecting an applicant by secret ballot in accordance with its constitution and by-laws was not subject to court review;

5. That the plaintiff was simply the alter ego of Dr. Frank Riggall, and that this was an at-

tempt to re-try the Riggall case in another name with this same relief being sought;

6. That the complaint did not state a complaint against the defendants under any law upon which relief could be granted.

The American Medical Association filed a motion to dismiss as to it because it was not subject to suit in the jurisdiction.

The District Court granted both motions, its decision being reported in *Elizabeth Hospital, Inc. v. Richardson, et al*, 167 Fed. Supp. 155.

The plaintiff appealed to the Court of Appeals for the 8th Circuit which court on July 10, 1958, in an opinion as yet unreported, but which appears in the appendix to the petition affirmed the action of the lower court holding that (1) neither under the common nor statutory law of Arkansas was there a right of action spelled out in the plaintiff's complaint; and (2) that the complaint failed to show that the conspiracy complained of had any restraining effect on interstate commerce within the meaning of the Sherman Anti-Trust Act.

POINT I

The Decision of This Court in Klor's v. Broadway Hale Stores Did Not Change the Rule that Section 1 of the Sherman Act Applies Only to Acts Involving a Substantial Interference with Interstate Commerce

The petitioner bases his principal argument upon the allegation that the Court of Appeals was in error in holding that an interference with an intrastate activity cannot constitute a violation of the Sherman Act unless its effect on interstate commerce was both substantial and

direct. Petitioner relies upon the decision of this court in *Klor's* v. *Broadway Hale Stores*, 3 L. ed. 2nd 741, 79 S. Ct. 705, as supported for its allegation of error.

Petitioner has quite evidently grossly misinterpreted the opinion in Klor's. As set out in the opinion, Klor's involved a wide combination of individuals engaged in interstate commerce. The following quotation clearly demonstrates that Klor's is not authority for petitioner's contention that the Sherman Act is available in circumstances involving private quarrels of an intrastate nature.

> "*Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer.* This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. *It interferes with the natural flow of interstate commerce.*"

It is also interesting to note that the opinion in Klor's was based to a large extent upon *Standard Oil* v. *U. S.*, 221 U.S. 1, 55 L. ed. 619, 31 S. Ct. 502, which opinion was based entirely upon monopolistic contracts "which interfere with the natural flow of an appreciable amount of interstate commerce". Petitioner urges that because this court held in Klor's that one merchant whose business was "so small that his destruction made little difference to the economony" might avail himself of the protection of the Sherman Act, the necessary conclusion to be drawn is that the interstate test of the Sherman Act has been abrogated. The opinion, however, does not justify such a conclusion. In addition thereto, Klor's by its own statement dealt with a group boycott of concerted refusal by

traders to deal with other traders. This court in the prior case (335 U.S. 594) refused to accept the contention that physicians occupied the same position as traders or that the practice of medicine was trade as that word is defined in the Sherman Act. It is sufficient to point out that in Klor's there had been a denial to the complainant of the right to do business, whereas, in the present case the petitioner and Dr. Riggall are both functioning and according to the allegations of the complaint quite vigorously.

The case of *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 594, 97 L. ed. 1277, 73 S. Ct. 872, is cited by petitioner as authority for his contention that the volume of interstate commerce affected has no effect on the application of Section 1 of the Sherman Act to particular acts. This Court did not so hold. In that case it stated "once granted that the volume of Commerce affected was not 'insignificant' or insubstantial, the Times-Picayune market position becomes critical to the case". In the footnote following this statement the opinion points out that the District Court did not find the volume of commerce affected by the restraint but this court further stated that in view of its disposition of the case, it would assume that the Sherman Act's substantiality test was met.

The petitioner further argues that under the decision of this court in *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. ed. 456, it is not necessary that the prohibited activities meet the substantiality test of the Sherman Act. The rationale of petitioner's argument is that the Sherman Act, irrespective of the amount of interstate commerce affected, is now applicable to instances of private injury without regard to the economic effect upon the general public. This argument is simply not substantiated by a reading of the court's decision.

Radovich involves an allegation of conspiracy to monopolize and control organized football, a multi-state

industry. The allegations were that the purpose of the conspiracy was to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States". Involved also was the transmission of games over radio and television "into nearly every State of the Union". The playing of the exhibitions themselves "is essential to the interstate transmission by broadcasting and television and the actions of the respondents against Radovich were necessarily related to these interstate activities".

The case thus involved complete market control of the professional football business on a mass interstate level.

There was no language contained in the decision on which to base an argument that the requirement of substantial interstate activity was eliminated from the application of Section 1 of the Sherman Act. The case did hold that where there was a volume of interstate business which resulted in market control to the injury of the general public, a member of the general public who was adversely affected could seek legal relief. It did not remotely suggest that relief under Section 1 of the Sherman Act was available in instances of private injury by the activities directed at one particular individual in an intrastate activity and in which the public suffered no injury and was not concerned economically.

Petitioner also cites *U. S. v. National Association of Real Estate Boards*, 339 U.S. 485, 94 L. ed. 1007, as authority for his contention. That case involved no interstate activity and indeed was essentially a price fixing case involving complete market control of the real estate business in the District of Columbia. In addtion thereto it arose under Section 3 of the Sherman Act which is applicable solely to the District of Columbia and could have no application to the case at bar.

POINT II

The Court of Appeals Correctly Held That the Complaint Did Not Allege Facts Sufficient to Constitute a Common Law Conspiracy Under Arkansas Law

As was observed by the Court of Appeals "the allegations of the complaint are, for all practical purposes, the same as the allegations contained in the complaint filed by Dr. Riggall in what might be termed the earlier case". The alleged injury to the petitioner stems from the lack of membership of Dr. Riggall in the local medical society. In addition to an allegation of liability under the Sherman Act, petitioner contends there was a common law conspiracy under state law to injure the petitioner by refusing membership in the local society to Dr. Riggall. There are 24 alleged results, illusory or otherwise, of the alleged conspiracy to deny Dr. Riggall membership in the Society, but it is quite evident that all of the alleged results stem from the adverse vote of the appellees on Dr. Riggall's application for Society membership.

On page six of the complaint the By-Laws with reference to membership are set out. Those By-Laws provide, among other things, that the Society shall be the judge of the qualification of its members. They also provide that the members shall vote upon all applications, that elections shall be by secret ballot; that three-fourths of the vote of the membership present and voting shall be necessary to elect. It is thus apparent that each member of the organization has the absolute right under its Constitution and By-Laws to vote secretly and express his or her approval or disapproval of the application of any individual. If any member is of the opinion that an applicant is not worthy of membership in the Society, he or she has the absolute unqualified right to vote "no". A negative vote

is not illegal under the Constitution and By-Laws, nor is it in any manner illegal under the laws of the State of Arkansas. In short, one member or any number of members, if they so desire, may lawfully disapprove the membership of any applicant if, in their opinion, he is not worthy of membership. The provision in the Constitution and By-Laws providing for a secret ballot eliminates any necessity for a disclosure of the reasons prompting the negative vote by any individual. Under the Arkansas law in order that a civil conspiracy may be said to exist there must be a combination of two or more persons by concerted action to accomplish an *unlawful means*. Unless it is unlawful to vote against Frank Riggall when he applies to a society for membership, a conspiracy cannot be said to exist simply because a large number of members of that society choose to exercise their rights by voting in the negative. The principle of the case at bar is similar to the principle in the very recent Arkansas case of *Southwestern Publishing Co. v. Ney*, 227 Ark. 852. In that case recovery was sought in a suit based upon a criminal conspiracy against certain individuals whom it was alleged had conspired to prevent the plaintiff from obtaining a television permit. The Arkansas Supreme Court held that the defendants had a legal right to oppose the permit and had a legal right to express their opposition thereto, and that under the circumstances no civil conspiracy existed under the laws of Arkansas as would justify an action. The Court said:

> "*Corpus Juris Secundum*, Vol. 15, 996, states: 'A civil conspiracy means a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful by unlawful means. * * *' In Words and Phrases, there are several definitions of the term. In addition to the one quoted above, (which is the most usual definition), we find at page 425, Vol. 8: 'A "conspiracy" is a combination of two or more persons by some concerted action to

accomplish an unlawful purpose.' At page 418 of the same Volume: 'A "conspiracy" is the combination of two or more persons to do something that is unlawful, oppressive, or immoral, or something that is not unlawful, oppressive, or immoral, by unlawful, oppressive or immoral means, or something that is unlawful, oppressive or immoral, by unlawful, oppressive, or immoral means.'

"While in some instances, we recognize that an unlawful purpose can be reached through a series of lawful acts, generally the acts which are committed in furtherance of accomplishing the unlawful purpose are either illegal acts, or acts tainted with elements of deceit, trickery or chicanery. The acts attributed to Ney are legal acts. It was not unlawful for him to oppose the granting of the permit—it was not unlawful for Ney to get others to join in the protest—it was not unlawful for Ney to employ an attorney to file with the Commission a petition protesting the approval of the assignment."

We think the further language of the Court in the above case to the effect that it would be contrary to good policy to establish a rule which would prevent citizens from exercising their privileges as free citizens to be most applicable here. The petitioner is seeking to establish a precedent that a person who is denied membership in a local society by secret ballot has the right to come into court and compel the individual members of the society to state publicly why they rejected his application notwithstanding the constitution and by-laws of the society provide for a secret ballot. The Arkansas Court comments on such actions by saying:

"We do not desire to establish a rule in this state which would discourage individuals from exercising their privileges as free citizens. As stated by the trial court in its opinion: ' • • • The constitutional guarantees of liberty of opinion and free-

> dom of speech would soon be impaired if citizens exercising those rights were to be compelled to defend their actions in expensive litigation, instituted by persons who resented and characterized the exercise of such rights as interference in their private affairs. * * *"

In the further case of *Reynolds, et al* v. *Hall*, 222 Ark. 478, wholesale and retail liquor dealers were charged with a conspiracy in that they united to obtain signatures to refer a three per cent tax on the wholesaler's selling price of alcoholic beverages. The Arkansas Court held that although there was concerted action, there was no conspiracy in the sense that that term was used in legal channels. The defendants were pursuing a course of action they had a legal right to pursue even if they did combine and confederate in their actions.

In *Meier* v. *Spear*, 96 Ark. 618, the Arkansas Supreme Court early adopted the rule to which it still adheres. That rule is contained in the following language:

> "What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. See also to the same effect the opinion of Chief Justice Parker speaking for the court in *National Protective Association* v. *Cumming*, 170 N. Y. 315, and of Judge Mitchell for the court in *Bolan Mfg. Co.*, v. *Hollis*, 54 Minn. 223; *Commonwealth* v. *Hunt*, 4 Met. Ill."

We thus see that under the Arkansas decisions the petitioner would have no cause of action against the appellees because they did what they were legally entitled to do when they cast their ballot against Dr. Riggall in his application for membership in the society. There is no contention that the rules of the society were not followed nor that the vote of the members was fraudulently obtained.

The contention is simply that in petitioner's personal estimation, Dr. Riggall is without flaw, fault or defect, and that an adverse vote against him must spring from a conspiracy on the part of those who rejected him.

CONCLUSION

The petitioner has alleged no injury to the public nor has it shown any burden or restraint upon interstate commerce. The sole question presented is whether the Federal Court under the Sherman Act will review the actions of members of a local medical society in voting not to admit a local physician into membership. The complaint in this case, as in the prior case, reflects that Riggall's right to practice medicine has not been in any manner diminished or denied. According to the allegations of the complaint, Riggall's practice has flourished. Indeed into where he has attained a position of "international recognition". The question remains, as in the former case, whether the practice of medicine is trade or commerce and whether a local physician practices in interstate commerce simply because he may treat at his local residence persons who reside in other states. It is submitted respectfully that the petition for writ of certiorari should be denied.

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